Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	
	)	

COMMENTS OF THE COMPETITIVE UNIVERSAL SERVICE COALITION

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Michele C. Farquhar
David L. Sieradzki
Ronnie London
HOGAN & HARTSON LLP
555 13th Street, N.W.
Washington, DC 20004
(202) 637-5600

Its Attorneys

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The Competitive Universal Service Coalition ("CUSC"), 1/ by counsel, hereby comments on the Notice of Proposed Rulemaking regarding the issues from the *Ninth Report and Order* that were remanded by the United States Court of Appeals for the Tenth Circuit. 2/

I. INTRODUCTION AND SUMMARY

The Commission's pro-competitive universal service policies, adopted pursuant to the Telecommunications Act of 1996 ("1996 Act"), are beginning to have a significant impact in enabling consumers in rural and high-cost areas to realize the benefits of local competition. These benefits include more competitive pricing

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1/ The Competitive Universal Service Coalition includes a number of diverse wireless and wireline competitive carriers (and their trade associations) that provide universal service or are considering doing so. For purposes of this filing only, Coalition member Competitive Telecommunications Association ("CompTel") does not join in these comments.

2/ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Notice of Proposed Rulemaking and Order, FCC 02-41 (rel. Feb. 15, 2001), 67 Fed. Reg. 10867 (Mar. 11, 2001) ("NPRM"); *Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001), *aff'g in part, rev'g in part*, *Federal-State Joint Board on Universal Service*, Ninth Report and Order, 14 FCC Rcd 20432 (1999) ("*Ninth Report and Order*").

structures for telecommunications services, more responsive service providers spurred by competition, and more rapid deployment of new technologies and service packages. Aided by federal universal service policies that are consistent with competitive entry into local telephone markets, competitive carriers are developing new ways of providing basic telephone service, and are making progress in serving historically underserved and hard-to-reach markets. Consumers in rural and high-cost areas are beginning to obtain access to a broader range available choices for telecommunications service, both in the type of services offered and among the carriers offering them, as well as new broadband offerings. In short, competitive carriers are beginning to play a real role in the provision of universal service.

These inroads have not come without a high cost, however. While incumbent local exchange carriers ("ILECs") were summarily designated as eligible telecommunications carriers ("ETC") for participation in federal universal service programs, new entrants seeking to serve high-cost and rural areas often face costly, extensive, protracted, and sometimes futile proceedings to achieve ETC status. In addition, in states with their own universal service programs, it has often been even more difficult for competitive carriers to earn the right to participate, particularly where the structure of some programs excluded non-incumbents as a matter of course.

The Tenth Circuit's remand of the *Ninth Report and Order* presents an ideal opportunity for the Commission to re-examine universal service reform to identify "uneconomical attributes of the current system that dampen competitive opportunity," with an eye toward remedying "shortcomings in the current system

[that] "undermin[e] economic competition and new entry." 3/ Among the most vital steps in this process will be, at long last, creating "inducements" for state commissions to adopt rules and policies that work in conjunction with federal efforts to preserve and advance universal service in a competitive environment, consistent with the 1996 Act and the Tenth Circuit remand decision. 4/ Thus, the Commission should make federal support available to carriers in each state only if (i) that state employs competitively and technologically neutral rules and procedures for designating eligible participants in state and federal universal service programs, and (ii) any and all intrastate subsidy mechanisms the state establishes are explicit, portable, and competitively and technologically neutral.

At the same time, the FCC must give meaning to the statutory terms "reasonably comparable" and "sufficient," and must revisit its benchmarking methodology, 5/ in a manner that prevents the total amount of federal universal service funding from growing excessively. The funds that support universal service ultimately come from consumers, who should not be required to pay any funding beyond that needed to ensure ubiquitous service in the highest-cost areas, consistent with advancing the twin goals of universal service and competition. In short, all

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3/ Chairman Michael K. Powell, *Digital Broadband Migration – Part II* (Oct. 23, 2001) (available at http://www.fcc.gov/Speeches/ Powell/2001/spmkp109.pdf), at 2, 5; *see also* NPRM at ¶ 25 ("We embark on the next stage by responding the court's remand, examining the current mechanism with a critical eye, and determining what further reforms are necessary.").

4/ *See Qwest Corp. v. FCC*, 258 F.3d at 1203-04.

5/ *See id*. at 1201-03; *see also* 47 U.S.C. §§ 254(b)(3),(5).

funding must be explicit, fully portable, and competitively neutral, and no greater than necessary to preserve and advance the availability of service to all consumers.

II. THE COMMISSION SHOULD ADOPT "INDUCEMENTS" FOR STATES TO ADOPT PRO-COMPETITIVE UNIVERSAL SERVICE POLICIES

In response to the Tenth Circuit's mandate, the Commission must "undertake the responsibility to ensure that the states act" 6/ to support universal service in a manner consistent with the 1996 Act's intent of dismantling barriers to entry. The Commission has been fully authorized to oversee, and the Tenth Circuit remand clearly contemplates, the adoption of FCC rules and policies to govern state efforts to promote the national goal of preserving and advancing universal service. Specifically, the Commission should condition receipt of federal universal service support by all carriers in each state upon state adoption of universal service rules and policies consistent with specified federal standards. 7/ Such rules must include designating all ETCs in a competitively and technologically neutral manner, and making state universal service funding explicit, fully portable, and available on a competitively and technologically neutral basis. This Commission has articulated the importance of these criteria repeatedly, 8/ and these principles have been expressly affirmed on appeal. 9/

6/ *Qwest Corp. v. FCC*, 258 F.3d at 1204.

7/ *See id*. ("the FCC might condition a state's receipt of federal funds upon the development of an adequate state program, an approach the FCC . . . conceded was possible").

8/ *See, e.g., Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange*

[footnote continues]

A. The FCC Has Authority to Condition Federal Support in a State on Pro-Competitive State Policies Consistent with the Act and the Federal Universal Service Program

The 1996 Act empowers the Commission to adopt rules and policies governing state universal service efforts, and the Tenth Circuit has directed the FCC to do so by explicitly specifying the steps states should take to comply with the Act's universal service goals. The Tenth Circuit's decision in *Qwest Corp. v. FCC* leaves no question that it is up to the FCC to provide direction for state efforts with respect to both federal *and* state universal service programs. This follows on the Supreme Court's holding that Congress granted the FCC ample authority to adopt rules

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Carriers, 16 FCC Rcd 19613, 19677, ¶ 149 (2001) ("*MAG Order*"); *Federal-State Joint Board on Universal Service*, Fourteenth Report and Order, 16 FCC Rcd 11244 (2001) ("*RTF Order*"); *Federal-State Joint Board on Universal Service*, Twelfth Report and Order, 15 FCC Rcd 12208, 12277, ¶ 151 (2000) ("*Twelfth Report and Order*"); *Ninth Report and Order*, 14 FCC Rcd at 20479, ¶ 89; *Federal-State Joint Board on Universal Service*, Seventh Report and Order, 14 FCC Rcd 8078, 8113, ¶ 73 (1999) ("*Seventh Report and Order*"); *Federal-State Joint Board on Universal Service*, Fifth Report and Order, 13 FCC Rcd 21323, 21326, ¶ 6 (1998) *Federal-State Joint Board on Universal Service*, Fourth Order on Reconsideration, 13 FCC Rcd 5318, 5334, ¶ 25 (1997); *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 8801-06, ¶¶ 47-55 (1997) ("*First Report and Order*").

9/ *See Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313, 319 (5th Cir. 2001) ("*TOPUC II*") ("we upheld the requirement that LECs must reduce access charges by an amount commensurate with the money received for the explicit universal service fund") (citing *Texas Office of Public Utility Counsel. v. FCC*, 183 F.3d 393 (5th Cir. 1999) ("*TOPUC I*")); *Comsat Corp. v. FCC*, 250 F.3d 931, 938 (5th Cir. 2001) ("permitting [cost recovery through implicit support in access charges] countermands Congress's clear legislative directive, as we articulated in *TOPUC* and reaffirmed in *Alenco*, that universal service support must be explicit") (citing *TOPUC I*, 183 F.3d at 425; *Alenco Communications, Inc. v. FCC* 201 F.3d 608, 623 (5th Cir. 2000)); *Alenco*, 201 F.3d at 622 ("portability is not only consistent with predictability, but also is dictated by principles of competitive neutrality").

governing state actions required under the 1996 Act. 10/ The Supreme Court's broad reading of the FCC's authority, and the Tenth Circuit's directive that "the FCC is required to develop mechanisms to induce adequate state action," 11/ establish the FCC's responsibility to adopt rules directing state universal service efforts.

It is evident that such rules may condition a state's receipt of federal universal service support upon the state commission adopting universal service rules consistent with the Act and the FCC's pro-competitive universal service policies. Indeed, the Tenth Circuit specifically presents the option that "the FCC might condition a state's receipt of federal funds upon the development of an adequate state program, an approach the FCC . . . conceded was possible." 12/

Depriving support to high-cost carriers in states that fail to adopt pro-competitive universal service policies, while severe, is nonetheless appropriate and fully consistent with the Tenth Circuit's mandate and the Act. Section 254 clearly anticipates that both the FCC *and* the states will act to preserve and support

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10/ *See generally AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). To be sure, the Fifth Circuit reversed the FCC's decision that the text of Section 214(e) precludes states from imposing additional ETC criteria. *TOPUC I*, 183 F.3d at 417-18. But the court expressly declined to rule on the FCC's jurisdiction in this regard, but rather held only that the statute was not as clear and unambiguous as the FCC had concluded. *Id.* ("Because we conclude that the agency erred in prohibiting the states from imposing additional eligibility requirements, we do not reach the states' jurisdictional challenges."). The court did not reverse any of the FCC's substantive or procedural rules regarding state commissions' ETC designations, and left the way clear for further FCC rulemaking on this issue. *Cf. id.* at 418 n.31.

11/ *Qwest Corp. v. FCC*, 258 F.3d at 1204.

12/ *Id.*

universal service, and that such efforts will provide for explicit, specific, predictable and sufficient universal service support. 13/ It is also clear Congress adopted Section 254 to ensure that universal service is provided in a manner that is consistent with open markets and competitive entry. 14/ But *Qwest Corp. v. FCC* illustrates that FCC efforts to support universal service alone will be insufficient to the task, and that the FCC cannot be required to carry that burden alone in any event. 15/ Thus, it is in keeping with this expectation to deny federal funding – which alone may be insufficient – in order to spur states to provide the remaining necessary support in a manner consistent with the overall federal policy framework. As the Tenth Circuit concluded, the Act contemplates that universal service can be supported only by joint federal and state efforts that are both focused on promoting the Act's pro-competitive intent. 16/

Finally, the Commission's response to the Tenth Circuit's remand decision would be incomplete if it failed to adopt rules and policies to ensure such state programs comply with the Act. The Tenth Circuit required the Commission to act so that its universal service rules and policies could work hand-in-hand with state universal service programs to advance the purposes of Sections 214(e) and

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13/ *See* 47 U.S.C. §§ 254(b),(f).

14/ *TOPUC II*, 265 F.3d at 318 ("Congress recognized that implicit subsidies [to support universal service] could not continue under the market-based regime ushered in by the 1996 Act.").

15/ *See Qwest Corp. v. FCC*, 258 F.3d at 1203 ("We therefore reject Qwest's argument that the FCC alone must support the full costs of universal service.").

Section 254. 17/ It is well-settled that these provisions – and the Act's pro-competitive intent – require that the promotion of universal service be competitively and technologically neutral, and not impose barriers to entry. 18/

In order for the federal and state universal service programs to work together as the Act and the Tenth Circuit contemplate, the Commission must adopt rules requiring all state universal service rules and policies to adhere to the FCC's standards for competitive neutrality, non-discrimination, explicit support, and full portability. The adoption of explicit rules is critical, in that new entrants should not have to resort (as has been the case to date) to piecemeal FCC oversight of state ETC designations and universal service programs. Such FCC proceedings are themselves costly and time-consuming, and new entrants must bear the burden of demonstrating preemptable state action. 19/ We explain further below the minimum requirements the FCC must build into its rules and guidance to ensure

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16/ *See id*. ("The Telecommunications Act plainly contemplates a partnership between the federal and state governments to support universal service.").

17/ *Qwest v. FCC* 258 F.3d at 1203 ("The [1996] Act plainly contemplates a partnership between the federal and state governments to support universal service.").

18/ *See supra* notes 8-9 and accompanying text.

19/ *See Federal-State Joint Board on Universal Service; Western Wireless Corp. Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, 15 FCC Rcd 15168 (2000) ("*South Dakota Declaratory Ruling*"); *Western Wireless Corp. Petition for Preemption of Statutes and Rules Regarding the Kansas State Universal Service Fund Pursuant to Section 253 of the Communications Act of 1934*, 15 FCC Rcd 16227 (2000) ("*Kansas Declaratory Ruling*"); *American Communications Servs., Inc., and MCI Telecomms. Corp. Petitions for Expedited Declaratory Ruling Preempting Arkansas Telecommunications Regulatory Reform Act of 1997 Pursuant to Sections 251, 252, and 253 of the Communications Act of 1934, as amended*, 14 FCC Rcd 21579, ¶ 17 (1999).

that state universal service policies parallel – and work jointly with – federal universal service to promote competitive entry.

B. The FCC Should "Induce" States to Designate ETCs in a Competitively and Technologically Neutral Manner

The FCC should ensure that state commission practices are in concert with federal pro-competitive universal service policies by requiring that, in order to receive federal funding, state commission rules and practices for designating ETCs must be competitively and technologically neutral. The Commission has recognized the importance that ETC designation plays in fostering competitive entry. 20/ The Commission has also found that:

> While Congress has given the state commissions the primary responsibility under section 214(e) to designate carriers as ETCs for universal service support, we do not believe that Congress intended for the state commissions to have unlimited discretion in formulating eligibility requirements. Although Congress recognized that state commissions are uniquely suited to make ETC determinations, we do not believe that [it] intended to grant to the states the authority to adopt eligibility requirements that have the effect of prohibiting the provision of service in high-cost areas by non-incumbent carriers. To do so effectively undermines congressional intent in adopting the universal service provisions of section 254. 21/

Each state therefore must adopt ETC designation procedures that do not unduly delay or thwart competitive entry. In addition, states cannot be permitted to use the designation process to impose ETC requirements or conditions that are

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20/ *South Dakota Declaratory Ruling*, 15 FCC Rcd at 15173, ¶ 12 ("A new entrant faces a substantial barrier to entry if the [ILEC] is receiving universal service support . . . not available to the new entrant for serving customers in high-cost areas.").

21/ *Id*. at 15180, ¶ 29.

systematically biased against commercial mobile radio service ("CMRS") providers, as such violations of competitive and technological neutrality harm consumers and contravene established federal policy. Finally, states must not abuse the designation process as an excuse for attempting to regulate CMRS rates or entry, as such attempts not only violate the Act, they are also without any public policy benefit. The provision of universal service will not be advanced by subjecting competitive carriers to regulations intended for carriers with market power.

1. The ETC Designation Process Must Not Pose a Barrier to Entry

Under Section 214(e) of the Act, the process of designating ETCs need not be any more complicated than determining whether the carrier can provide the supported services (and, in rural ILEC study areas only, whether designating an additional carrier would serve the public interest). 22/ To implement the Act, the FCC has already adopted a number of rules and policies governing the state process of designating ETCs. 23/ Nonetheless, a number of state commissions have adopted policies and practices that have the effect of precluding competitive carriers from obtaining ETC designation. The FCC should establish "inducements" for states to eliminate any such anti-competitive policies.

22/ *See* 47 U.S.C. § 214(e)(1)-(2).

23/ *First Report and Order*, 12 FCC Rcd at 8809-25, 8850-55, 8861-75, ¶¶ 61-87, 134-41, 157-180; 47 C.F.R. § 54.201 *et seq.*; *cf. South Dakota Declaratory Ruling*, *supra* note 19 (holding that states may not require non-incumbent carriers to be already providing ubiquitous universal service in order to receive ETC designation).

First, the FCC must ensure that competitive entrants receive the benefit of the same streamlined and expedited procedures used in 1997 to designate ILECs as ETCs. Some states have taken as long as three years to process ETC applications. 24/ Thus, as it proposed two years ago, the Commission should rule that state commissions must act on applications for ETC designation within a period of no longer than six months after they are filed. 25/ Such a requirement, or at least a rule providing that states failing to proceed in this manner will lose federal support, would preclude the anti-competitive delays and excessive procedures imposed by some state commissions.

24/ For example, Western Wireless first filed for ETC status with the Nebraska Public Service Commission ("NPSC") over three-and-a-half years ago. After a one-year delay in which no state action occurred, Western Wireless was forced to refile its request. After another year, the NPSC granted ETC status, but imposed the condition – which had not been required of any other ETC in the state – that Western Wireless file an "advertising plan" before receiving federal or state support. Though NPSC approval of the plan was promised within 30 days without holding a hearing, the state commission has held hearings, required refiling of the plan, and to date – fifteen months after imposing the requirement – has yet to rule. Another example may be found in the nearly two years the New Mexico Public Regulation Commission ("PRC") took to grant the petition of Leaco Rural Telephone Cooperative to be designated as an ETC providing universal service as a CLEC. For no apparent reason, it took a Hearing Examiner over a year to issue a recommended decision, which was then followed by nearly another year for the full PRC to adopt and approve the Hearing Commissioner's recommendation. *See Petition of Leaco Rural Telephone Cooperative, Inc., as a Competitive Local Exchange Carrier, for Designation as an Eligible Telecommunications Carrier*, Utility Case No. 3347, Final Order (NM PRC March 26, 2002). Notably, Western Wireless' ETC petition for New Mexico is still pending after three-and-a-half years.

25/ The current proceeding to address the Tenth Circuit remand of the *Ninth Report and Order* is an ideal opportunity for the FCC to adopt its proposal to require that state commissions complete ETC designation procedures within a six-month period, raised in an outstanding Further Notice of Proposed Rule-making. *See Twelfth Report and Order*, 15 FCC Rcd at 12277, ¶¶ 151-152.

Second, the FCC should preclude state commissions from imposing inconsistent and burdensome rules and procedures regarding separate eligibility designations for state and federal universal service funding. For example, in Oklahoma, competitive carriers seeking ETC designation in rural ILEC areas must endure two duplicative application procedures – first to get ETC designation for federal funding, then to attain "carrier of last resort" status for state funding. 26/ If a state wants its carriers to receive federal universal service funding, it should be required to use the same, minimal standards – tracking those adopted by this Commission – for both federal and state ETC designation. 27/ States should also be required to conduct all proceedings required for a carrier to receive federal and state support concurrently, and under the same deadlines. This would prevent states from imposing burdensome requirements exclusively upon competitive ETCs (but not ILECs), which amount to barriers to competitive entry.

26/ *See Application of GCC License Corp. for Certification as an Eligible Telecommunications Carrier Pursuant to the Telecommunications Act of 1996*, Cause No. PUD 980000470, at 17, ¶ 22.d (Okla. Corp. Comm'n April 11, 2001) ("GCC must accept carrier of last resort obligation throughout the rural telephone companies' study areas") (*Oklahoma ETC Order*"); Okla. Admin. Code, § 165:59-3-14(d)(3) ("For any area served by an ILEC which serves less than [75,000] access lines . . . , only the [ILEC] shall be eligible for OUSF funding except . . . [w]hen the Commission, after notice and hearing, [determines] that it is in the public interest that another . . . service provider . . . also be deemed a carrier of last resort and be eligible to receive OUSF funding in addition to the [ILEC].").

27/ *See supra* note 23 and accompanying text.

2. States May Not Abuse ETC Designation to Impose Rate or Entry Regulation on CMRS Providers

The Commission should adopt "inducements" to preclude states from adopting ETC criteria or conditions that would require commercial mobile radio service ("CMRS") providers, in effect, to relinquish their federal statutory exemption from state rate and entry regulation simply because they wish to become ETCs. 28/ Some states have adopted such criteria or conditions on wireless ETC applicants, even though the state commission has not requested such regulatory authority under Section 332(c)(3) of the Act and the FCC has not granted it.

For example, Texas, Minnesota, and Utah, among others, have specified as a condition of ETC designation the rates Western Wireless may charge. These and other states typically have benchmarked the price Western Wireless may charge to the existing ILEC rates. 29/ In addition, California, Minnesota, and Utah

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28/ *See* 47 C.F.R. § 332(c)(3). Notably, Section 332(c)(3) requires a state to petition the FCC for authority to regulate rates for any CMRS offering, and a state may only do so under specific conditions that are not triggered merely because the state designates a CMRS provider as an ETC.

29/ *See, e.g., Application of WWC Texas RSA Limited Partnership for Designation as an Eligible Telecommunications Carrier Pursuant to 47 U.S.C. § 214(e) and PUC Subst. R. 26.418*, PUC Docket No. 22295, SOAH Docket No. 473-00-1168, Order, at 7 (Texas PUC Oct. 30, 2000) ("To receive designation as an ETP, WWC is required to show that it will offer basic local . . . service at a rate not to exceed 150% of the ILEC's tariffed rate.") (citing P.U.C. Subst. R. 26.417(c)(1)(B)); *Minnesota Cellular Corp.'s Petition for Designation as an Eligible Telecommunications Carrier*, Docket No. P-5695/M-98-1285, Order Granting Preliminary Approval and Requiring Further Filings, at 10, 22 (Minn. PUC Oct. 27, 1999) ("*Minnesota ETC Order*") (noting that Minnesota PUC "intends to hold [Minnesota Cellular] to its word – that it will offer . . . universal service . . . priced within 10% of the incumbents' standard rates," and requiring "a compliance filing including . . . a tariff . . . which shall include at least one package which includes . . . a price that does not exceed 110% of the current rates of the incumbents"); *Petition of WWC Holding Co., Inc. for Desig-*

[footnote continues]

have required Western Wireless to offer unlimited local usage within a local calling area defined by the ILEC's regulated local calling areas. 30/ But the Act specifically denies states the authority to impose mandates on the quantity of service a CMRS provider must provide at a fixed price, or on the geographic scope of the service. 31/ Also, as noted, no universal service goal will be advanced by forcing competitive carriers to accede to a regulatory structure designed for carriers with market power.

Imposing tariff requirements on CMRS carriers constitutes another form of rate and entry regulation that Section 332(c)(3) of the Act forbids states from imposing. Nonetheless, a number of states, including Nevada, Minnesota and Oklahoma, have required CMRS carriers to file tariffs as a consequence of ETC

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nation as an Eligible Telecommunications Carrier, Docket No. 98-2216-01, Report and Order, at 12 (Utah PSC July 21, 2001) ("*Utah ETC Order*") ("Western Wireless will need to charge no more than the Affordable Base Rate for their universal service offering. The Commission has set rates for the U.S. West exchanges . . . and presumes that these rates represent the affordable rates[.]"), *aff'd, WWC Holding Co., Inc. v. Public Svc. Comm'n*, 2002WL337869 (Utah 2002).

30/ *See* Cal. Admin. Code R. 95-01-020, I.95-01-021, §§ 4.B.4, 4.B.9 (requiring local exchange residential service eligible for state universal service support to provide the ability to receive free unlimited incoming calls and to give customer the choice of flat or measured rate service); *Minnesota ETC Order* at 22 (requiring as part of tariff filing the inclusion of "one package which includes . . . unlimited local usage"); *Utah ETC Order* at 12 (requiring provision of a "free local calling area in every area served [that] will be as large, or larger, than the calling area currently provided by U.S. West"). While the FCC has required all ETCs to provide local usage, it has not adopted any specific minimum quantity of usage nor defined local for this purpose.

31/ 47 U.S.C. § 332(c)(3); *cf. Bastien v. AT&T Wireless*, 205 F.3d 983, 986-89 (7th Cir. 2000).

designation. 32/ The Commission should rule that any state that adopts such requirements or conditions will lose its eligibility to receive any form of federal universal service high-cost support.

3. States May Not Abuse ETC Designation to Impose Unlimited Local Usage Requirements or Other Non-Technologically Neutral Conditions

Some states have employed ETC designation criteria, or have imposed conditions on carriers at the time that they grant ETC designation, that establish systematic biases against non-incumbent carriers. The FCC, consistent with its established policy, should act to ensure that all state ETC designation criteria are competitively and technologically neutral, and to preclude any criteria or conditions that are biased against entrants. 33/ For example, as noted above, some states have required carriers designated as ETCs to offer unlimited local service. 34/ The

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32/ *See Minnesota ETC Order* at 22 ("Minnesota Cellular shall make a compliance filing including . . . a tariff containing a detailed description of its universal service package offering . . . ."); *Oklahoma ETC Order* at 17, ¶ 22.a ("GCC must submit and have a tariff approved by this Commission. The tariff must include a complete description of the terms, conditions and pricing of its universal service offerings and be in compliance with [state law]."); *Application of WWC License LLC d/b/a CELLULAR ONE to be Designated as an Eligible Telecommunications Carrier in the State of Nevada Pursuant to NAC 704.680461 and Section 254 of the Telecommunications Act of 1996*, Docket No. 00-603, at 3 (Nevada PUC Aug. 22, 2000) ("Western Wireless shall . . . file an advisory tariff . . . which shall include the rates, terms and conditions, and proposed local calling areas").

33/ *See e.g., Seventh Report and Order*, 14 FCC Rcd at 8085, ¶ 7 ("we reaffirm our commitment to the principle that universal service support should be available to all [ETCs] on an explicit *and portable* basis. We also reaffirm that all carriers that provide the supported services, regardless of the technology used, are eligible for designation as an [ETC].") (emphasis in original, footnote omitted).

34/ *See supra* note 30; *see also* 47 C.F.R. § 54.101(a)(2). The FCC has required that ETCs provide local usage, but has not specified any minimum quantity.

Commission should not countenance such requirements, or should preclude states that impose them from receiving any federal universal service support.

The Commission has already acknowledged that an unlimited local usage requirement could favor ILECs at the expense of CMRS providers. 35/ Since ILECs' costs are largely non-traffic sensitive, unlimited local service is a rate structure that reflects the way they incur costs. By contrast, wireless carriers incur costs that are much more traffic-sensitive, so a rate structure in which consumers pay for minutes beyond a contracted-for initial increment reflects CMRS principles of cost-causation. 36/ Unlimited local usage simply makes no sense for CMRS carriers, even if it does for ILECs.

It is clear that CMRS carriers and other competitive entrants must not be forced to mimic ILEC rate structures or other practices as conditions for ETC designation. Any such requirement would violate technological and competitive

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35/ *Federal-State Joint Board on Universal Service*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 21252, 21278, ¶ 47 (1999) ("*MO&O/FNPRM*") ("Different technologies have different cost and rate structures, and, in particular, wireline and wireless carriers will be affected differently by the level of flat-rated local usage that a carrier must provide in order to be eligible to receive universal service support."). Similarly, the FCC has already found that requiring all ETCs to offer equal access, which is neither required by nor consistent with technological neutrality, serves no purpose other than to disqualify CMRS providers from receiving support for providing universal service. *First Report and Order*, 12 FCC Rcd at 8819-20, ¶ 79 ("competitive neutrality does not require that, in areas where [ILECs] are required to offer equal access to interexchange service, other carriers receiving universal service support in that area should also be obligated to provide equal access"); *id.* at 8819, ¶ 78 ("requir[ing CMRS carriers] to provide equal access in order to receive universal service support" is "contrary to the mandate of section 332(c)(8)").

36/ *MO&O/FNPRM*, 13 FCC Rcd at 21278-79, ¶¶ 47-48.

neutrality. Moreover, such practices are fundamentally inconsistent with the competitive local marketplace that the 1996 Act was intended to establish. In an open market, consumers should be allowed to decide for themselves whether to purchase basic telecommunications connectivity and functionality from an ETC that allows them free rein to select and/or change among long distance providers, or from an ETC that packages local and long distance service together, and perhaps offers other features such as an expanded local calling area, broadband capacity, or mobility. The overarching purpose of universal service reform and its attendant designation of ETCs is opening basic local telephone service to competition, in which market forces – not regulatory oversight – compel carriers to set prices at levels consumers find attractive. States should not be permitted to give ILECs a competitive leg up on competitive entrants – especially in view of the progress CMRS carriers have made in becoming some customers' sole service provider. 37/

C. All State Universal Service Support Mechanisms Must Be Explicit, Portable, and Competitively and Technologically Neutral

The Commission should require that if a state has established an intrastate universal service funding program, all support mechanisms under any

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37/ *See, e.g.*, Yuki Noguchi, *Cutting the Cord*, THE MIAMI HERALD, Jan. 7, 2002 ("About 2.2 percent of people in the [U.S.] have done away with their regular phone service and depend totally on their cellphones or other wireless devices, according to [CTIA] . . . ."); *see also* Elizabeth V. Mooney, *Wireless Replacement May Pose Threat to LECs by Decade's End*, RCR WIRELESS NEWS, March 25, 2002 ("Wireless is getting cheaper faster than wireline, and the reality is that the percentage of users who could benefit cost-wise from landline replacement is growing.") (internal quotation and editing omitted).

such program must be explicit, portable and competitively and technologically neutral, like the federal program, for the state to qualify for federal support. State universal service programs that provide support to some but not all carriers would defeat the purpose of Section 254, and the Tenth Circuit remand thus requires the Commission to adopt inducements to ensure all state funding mechanisms are competitively neutral. All barriers to competitive entry in state universal service mechanisms must be dismantled before carriers in a state should be able to qualify for support under federal mechanisms.

First, if a state decides to establish a universal service funding system, all explicit support provided under the program must be fully portable. The FCC has recognized this principle repeatedly, and made full portability a centerpiece of *every* federal universal service and access charge reform effort to date. 38/ As the Commission has noted, full portability means that all eligible carriers must receive the same amount of support for serving the same customers as an ILEC. If the amount of support varies by carrier, all incentive to provide service in a more efficient manner, using new technologies and/or under more favorable pricing structures for consumers, will be lost.

Second, the Commission should prohibit states from limiting support to a single carrier. In view of the ruling in the *Kansas Preemption Order*, it should be obvious by now that making some or all universal service support in a state available to only one carrier violates the Act. In that case, the Commission found:

> A mechanism that makes only ILECs eligible for explicit support would effectively lower the price of ILEC-provided service relative to competitor-provided service by an amount equivalent to the amount of the support provided to ILECs that was not available to their competitors. * * * * A mechanism that provides support to ILECs while denying funds to eligible prospective competitors [ ] may give customers a strong incentive to choose service from ILECs rather than competitors. [I]t is unreasonable to expect an unsupported carrier to enter a high-cost market and provide a service that its competitor already provides at a substantially supported price. 39/

Yet other states continue to create universal service programs that allow only one carrier to receive support. For example, in Nevada, designated ETCs may receive state universal service support only in areas where "other viable options are not available to provide or improve service," in other words, where the ILEC is no longer providing service. 40/ As this confronts competitive carriers with the same problems identified in the *Kansas Declaratory Ruling*, such state universal service constructs must be prohibited.

Finally, to the extent that a state decides to provide state support for only a single line per customer, any state support limited in this manner must be

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38/ *See supra* note 8; *see also Alenco*, 201 F.3d at 622 ("portability is not only consistent with predictability, but . . . dictated by . . . competitive neutrality").

39/ *Kansas Declaratory Ruling*, 14 FCC Rcd at 16231, ¶ 8.

40/ *Filing by WWC License LLC (Western Wireless Corporation) for Nevada Universal Service Fund Funding Commencing January 1, 2002*, Docket No. 01-6051, Order, at 5, ¶ 18 (Nov. 26, 2001) ("Western Wireless cannot receive the requested disbursements because a 'viable option' is available. Designation . . . as an ETC does not give Western Wireless a 'right' to NUSF funds; rather [it] allows Western Wireless to apply for NUSF funds. * * * * Western Wireless is requesting funds for service to areas that are already being served, therefore, other viable options are available. Consequently, as a matter of law Western Wireless cannot receive the NUSF funds it requests.") (construing Nev. Admin. Code § 704.68043).

shared equally among all the ETCs that provide service to a customer. 41/ Allowing the first carrier that enrolls a customer to receive all the support for serving the customer, while its competitors receive none, is essentially identical to providing funding only to ILECs and excluding new entrants – a result that the FCC has already ruled to be anti-competitive and contrary to the Act. 42/ Rather than arbitrarily providing all of the available support to one of the multiple ETCs that may serve a single customer, it would make much more sense to divide available support among the ETCs providing service to a particular customer. 43/

III. THE COMMISSION SHOULD RESPOND TO THE TENTH CIRCUIT REMAND OF THE HIGH-COST FUNDING MECHANISM IN A PRO-COMPETITIVE MANNER

The Tenth Circuit remand gives the FCC an excellent opportunity to revisit and reform the existing high-cost support mechanism. In conducting that

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41/ *First Report and Order*, 12 FCC Rcd at 8829, ¶¶ 95-96.

42/ *See Kansas Declaratory Ruling*, *supra* notes 19, 39.

43/ Some may argue that the customer should be allowed to decide which carrier should receive the funding. CUSC respectfully submits that such a system would be unworkable, and potentially anti-competitive. For one thing, the system would be extraordinarily complicated to administer. More important, it is highly unlikely that either ILECs or competitive ETCs would adopt different rates for customers that do, or do not, select them as their primary ETC (*e.g.*, "the price is $20 if you choose me as your primary ETC and $30 otherwise"). Rather, both ILECs and competitive ETCs are each likely to charge all their customers the same rates. This means the customer would face no consequences from choosing which carrier will receive the support. Without any market consequences, it simply makes no sense to have consumers "vote" on who should receive support dollars. Finally, if customers were allowed to decide, many might arbitrarily decide that the ILEC line is the "primary" line, just because they had service from the ILEC first – but this would unfairly benefit the ILEC solely due to its incumbency, and would make competitive entry difficult or impossible.

review, the Commission should adhere to its established pro-competitive principles. It should keep in mind that not all carriers are subject to rate-regulation, but rather should reflect that some ETCs are (and will remain) non-rate regulated, and that market competition, not regulatory restrictions, will be the key determinant of the rates paid by these carriers' consumers. The Commission should also define the terms "reasonably comparable" and "sufficient" in a manner that protects against excessive growth of the overall fund to avoid imposing undue burdens on consumers and carriers across the country. Finally, the Commission should harmonize its inconsistent rules for support in non-rural and rural areas, and for support corresponding to intrastate- and interstate-allocated costs.

A. Federal High-Cost Support Must Continue to be Portable and Competitively Neutral

The Commission's response to the remand of the *Ninth Report and Order*'s treatment of reasonable comparability, sufficiency of support, and bench-marking 44/ must reinforce the Commission's established pro-competitive universal service principles. To continue fostering nascent competitive entry in rural and high-cost areas, the Commission must continue in its commitment to make all support explicit, portable and competitively neutral.

These principles are so well-established in the Commission's universal service decisions and appellate review thereof that they hardly bear repeating, 45/

44/ *See Qwest Corp. v. FCC*, 258 F.3d at 12001-02.

45/ *See supra* notes 8-9; *see also* CUSC Comments on Petitions for Reconsideration of the MAG Order, CC Docket Nos. 00-256 & 96-45 (filed Feb. 14, 2002).

except in response to some doubts that recently have been expressed about them. When the FCC adopts rules for providing support that are rooted in portability and competitive neutrality, it is *not* using universal service support as a means of artificially "creating competition" in high-cost areas. 46/ Rather, rules providing for portable funding are aimed at dismantling artificial impediments to competition that were inherent in the pre-existing system's implicit subsidies that historically were available only to the local monopolists. The Act requires the elimination of such monopolies and the replacement of implicit federal subsidies with explicit, portable support appropriate to competitive markets. 47/ Competitive entry simply cannot occur if incumbents are receiving subsidies that are not available to new entrants. Thus, making those subsidies portable does not induce entry, it simply removes a regulatory impediment to entry.

Finally, in analyzing "reasonable comparability" and "sufficiency," the Commission should not assume that all ETCs are ILECs, or that all carriers' rates are based on embedded cost or are necessarily rate regulated. Rather, the analysis also should take into account the complexity of the real world, in which unregulated carriers like CLECs and CMRS providers are beginning to compete with ILECs. While it may make sense for the FCC or state commissions to require that ILECs

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46/ *See MAG Order*, 16 FCC Rcd at 19770 (separate statement expressing "concerns with the Commission's policy . . . of using universal support as a means of creating 'competition' in high cost areas"); *Federal-State Joint Board on Universal Service; Petitions for Reconsideration of Western Wireless Corporation's Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, 16 FCC Rcd 19144, 19154 (2001) (same).

47/ *Alenco*, 201 F.3d at 616.

maintain rates in rural areas at specified levels deemed "comparable" with those in urban areas, there is no need to impose such requirements on competitive entrants. As the Commission has long recognized, market discipline – and competition with the ILECs – will be sufficient to ensure that competitive entrants charge their end-users rates that are reasonable, and reasonably comparable. 48/

B. The Definitions of "Reasonably Comparable" and "Sufficiency" Must Protect Against Excessive Growth in the Size of the Fund

The Commission must also protect the federal universal service fund against excessive growth. To provide for below-cost rates to consumers in areas where the cost of service would otherwise yield prohibitively high prices, customers of all carriers must bear the burden of the support mechanism. 49/ If too large a subsidy is provided, however, then the burden on non-high-cost customers across the country will be greater than is necessary. The Commission's universal service mechanism must recognize that competition can work hand-in-hand with explicit

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48/ *E.g.*, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 85 F.C.C.2d 1, 31, ¶¶ 88-89 (1980) ("The economic underpinning of [streamlining regulations] for non-dominant carriers flows from the fact that firms lacking market power simply cannot rationally price their services [or impose terms] in ways which [are unjust, unreasonable or discriminatory.] [A] non-dominant competitive firm, for example, will be incapable of violating the just and reasonable standard[.] If it charges unreasonably high rates or imposes unreasonable terms or conditions in conjunction with the offering, it would lose its market share as its customers sought out competitors whose prices and terms are more reasonable. [I]t is equally unlikely that a competitive firm would engage in a strategy of below-cost or predatory pricing in an attempt to drive rivals out of the market. * * * * [P]rice (or term) differentials, when offered by carriers lacking price control, are indicative of competition – not of wealth-transferring price discrimination schemes.") (footnote omitted).

49/ 47 U.S.C. § 254(b)(4).

subsidies to bring prices in rural and high-cost areas closer to cost, such that smaller subsidies may be needed to bring prices in rural and high-cost areas closer to those in non-rural and non-high-cost areas. In addition, targeting support where it is most needed – *i.e.*, providing support only in the highest-cost areas – will help keep federal universal service funding from growing uncontrollably.

The Commission's effort to give meaning to the statutory terms in the Act's universal service provisions therefore must reflect that, while Congress intended to place consumers in rural and high-cost areas on a comparable footing to those in urban areas, it was never intended – nor is it possible – for them to be identically situated. The goal that rates for telecommunications services in rural and high-cost areas be "reasonably comparable to rates charged for similar services in urban areas" 50/ does not mean identical prices must be available. Rather, just as there is a wide range of rates among different urban areas, there is an acceptable range of rates among rural and high-cost areas as well. As the Commission noted, it is reasonable to take cost differences into account. 51/ It is also important to ensure that consumers in rural and high-cost areas have the same range of service alternatives – and the same opportunities to purchase from competitive entrants –

50/ *Id*. § 254(b)(3); *cf. TOPUC II*, 265 F.3d at 321 ("we have approved the FCC's interpretation of the statutory principles [in Section 254] as aspirational only") (citing *TOPUC I*, 183 F.3d at 421 (refusing to "rely[ ] on the aspirational language in § 254(b) to bind the FCC to adopt certain cost methodologies for calculating universal service support")).

51/ *See* NPRM at ¶ 16.

as are available in non-rural and non-high-cost areas. 52/ The only way to achieve this, however, is for the Commission's universal service rules to incent, and not deter, competitive carriers from serving rural and high-cost areas.

In addition, "sufficiency" must take into account all sources of revenue and support available to carriers that serve rural and high-cost areas. This means, first, that the Commission should not assume that the federal fund (or state funds) must be responsible for funding 100% of the cost beyond some arbitrary benchmark. The Commission must also take into consideration other ways in which carriers can and do defray the costs of serving high-cost customers, including providing services other than the supported services and functionalities.

C. The Commission Should Establish Consistent Funding Programs for Rural and Non-Rural Carriers, and for Interstate- and Intrastate-Allocated Funds

The Commission should not delay its "comprehensive examination of how the rural and non-rural [universal service support] mechanisms function together." 53/ Rather, such action is required in response to the Tenth Circuit remand, 54/ which requires the Commission to "explain further its complete plan for universal service" and "embark on the next stage by responding to the . . .

52/ *See* 47 U.S.C. § 154(b)(3) ("Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high-cost areas, should have access to telecommunications and information services . . . that are reasonably comparable to those service provided in urban areas . . . .").

53/ NPRM at ¶ 28.

54/ *See id*. at ¶ 25 (noting the court "determined that it was unable to assess the adequacy of support levels for all components of universal," in part due to the FCC's divergent universal service mechanisms) (citing *Qwest v. FCC* 258 F.3d at 1204).

remand, examining the current mechanism with a critical eye, and determining what further reforms are necessary." 55/ This means that the Commission must begin *now* its process of "conducting a comprehensive review of the high-cost mechanisms for rural and non-rural carriers as a whole to ensure [both] function efficiently and in a coordinated fashion." 56/ The Commission should also take this opportunity to reconcile the separate and inconsistent support mechanisms for *intrastate-allocated costs* (*i.e.*, the mechanism for non-rural carriers established in the *Seventh Report and Order* and the *Ninth Reports and Order*, and the mechanism for rural carriers established in the *RTF Order*) and for *interstate-allocated costs* (*i.e.*, the funds established by the *CALLS Order* for non-rural carriers and by the *MAG Order* for rural carriers). 57/

CUSC respectfully submits that the Commission has now, more than six years after adoption of the 1996 Act, reached the point of diminishing returns on bifurcating the world of high-cost support with radically different systems for rural and non-rural ILEC service areas. 58/ Ultimately, all high-cost areas should

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55/ *Id*. (quoting *Qwest v FCC*, 258 F.3d at 1205).

56/ *Id*. at ¶ 27.

57/ *See Seventh Report and Order*, *supra* note 8; *Ninth Report and Order*, *supra* note 2; *RTF Order*, *supra* note 8; *MAG Order*, *supra* note 8; *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long-Distance Users, Federal-State Joint Board on Universal Service*, 15 FCC Rcd 12962 (2000) ("*CALLS Order*").

58/ *See, e.g.*, *RTF Order*, 16 FCC Rcd at 11310, ¶ 170 ("Although we find that distinct rural and non-rural mechanisms are appropriate at this time . . . we are not convinced that this is a viable long-term solution."); *see also id*. at 11311, ¶ 173 ("Although we agree with the Rural Task Force that a distinct rural mechanism is

[footnote continues]

receive targeted funding based on a forward-looking cost-based mechanism. The only way to devise a workable system of "benchmarking" costs in high-cost areas against those in the rest of the country in a competitive environment is for all analyses to proceed on a forward-looking basis. Such a forward-looking analysis is critical to targeting support where it is most needed, which is in turn vital to keeping the size of the fund in check and enabling competitive entry in high-cost areas. 59/ Any support mechanism based on embedded costs, meanwhile, is necessarily (i) ILEC-centric, and (ii) incompatible with both appropriate market entry signals and innovation by incumbent carriers and competitive entrants.

In addition, though the Commission only recently adopted the "CALLS Plan" and the "MAG Plan" to reform access charges for, respectively, non-rural and rural telephone companies, 60/ it is of questionable utility to continue bifurcating the world between "interstate access related support" and separate support funds for intrastate-allocated costs. For one thing, the CALLS and MAG orders set the levels of interstate access-related funding based largely on the amount of access

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appropriate at this time, we believe that there may be significant problems inherent in indefinitely maintaining separate mechanisms based on different economic principles.").

59/ For example, several states have pockets of challenging topography and/or isolated or disperse populations that make them extremely expensive to serve, yet no support is available, because the ILEC that serves the area also serves other portions (or the rest) of the state and has non-disaggregated rates or costs that do not qualify for support under current FCC rules. However, if support were to be disaggregated and properly targeted, it could incent competitive entry to the benefit of consumers in these high-cost areas. Absent this support, though, new entrants have no hope of competing with a self-subsidizing ILEC to serve these customers.

60/ *See MAG Order, supra* note 8; *CALLS Order, supra* note 57.

rate reductions ordered at the same time; in the long term, the FCC must develop a more principled basis for setting the size of these funds. Moreover, the separation of costs between interstate and intrastate allocations is an unstable concept in an era when there may be major shifts between the two (*e.g.*, dial-up Internet calls, which were allocated to intrastate in the past, could be allocated to interstate in the future). Furthermore, comprehensive review of interstate and intrastate universal service funding mechanisms is needed in view of the current proceeding on inter-state and intrastate mechanisms for intercarrier compensation, 61/ as well as to respond to the Tenth Circuit's specific request in the remand order. 62/

All told, the FCC should adopt a single system that eliminates implicit subsidies, provides sufficient and predictable support to high-cost areas in the same manner regardless of whether they are served by rural or non-rural ILECs, and targets funding to the areas that need it most. The end result of such a system would reduce the disproportionate amounts of support received by rural ILECs, while distributing support dollars more equitably to high-cost areas. This would provide proper signals to competitive entry. It also would eliminate the current embedded-cost based rural intrastate support system, which is fundamentally incompatible with portability. In sum, the Commission should take advantage of the Tenth Circuit's remand order to pursue a progressive and comprehensive federal approach to universal service funding.

61/ *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001).

62/ *See Qwest v. FCC*, 258 F.3d at 1204-05.

IV. CONCLUSION

The Commission should respond to the Tenth Circuit remand by adopting "inducements" for pro-competitive state universal service policies, and by reforming the federal high-cost support mechanisms, as discussed above.

Respectfully submitted,

COMPETITIVE UNIVERSAL SERVICE COALITION

/s/ David L. Sieradzki
Michele C. Farquhar
David L. Sieradzki
Ronnie London
HOGAN & HARTSON LLP
555 13th Street, N.W.
Washington, DC 20004
(202) 637-5600

Its Attorneys

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